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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

)
Amendment of the Commission's)
Rules To Establish New Personal)
Communications Services)

Gen Docket No. 90-314
ET Docket No. ~~92-100~~

To: The Commission

REPLY TO COMMENTS ON PETITION FOR PARTIAL RECONSIDERATION

Radiofone Inc. (Radiofone), by its attorneys and pursuant to Rule Section 1.429, hereby replies to the various comments and/or oppositions filed by the parties to the above-captioned proceeding, which relate to the positions taken by Radiofone in its December 8, 1993 Petition for Partial Reconsideration ("Petition"). This Petition sought reconsideration of the cellular ownership restrictions adopted by the Commission in its Second Report and Order in the above captioned proceeding (58 Fed. Reg. 59,174, November 8, 1993). As discussed below, none of the commentators have successfully refuted Radiofone's showing that the Commission's decision to limit cellular carriers to only 10 MHz of personal communications service (PCS) spectrum arbitrarily precludes a substantial portion of the wireless industry from effectively participating in this new technology, to the detriment of the public.

Several parties to this proceeding support Radiofone's showing that the Commission's cellular ownership restrictions are adverse to the public interest, and

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actually bring about a reduction in competition. See Comments of McCaw Cellular Communications, Inc. at pp. 4-10; Opposition/Comments of the Cellular Telecommunications Industry Association (CTIA) at pp. 3-6; comments of Bell Atlantic at pp. 10-12; comments of BellSouth. Radiofone's Petition (at pp. 8-10) pointed out that the Commission had erroneously based the cellular restrictions on unsupported assertions of "undue market power" being exercised by cellular carriers, without any analysis of this market power. CTIA has taken this showing a step further, by including in its petition for reconsideration a market analysis demonstrating that cellular carriers indeed will not be able to exercise undue market power against PCS providers. This study has not been refuted. Instead, MCI attempts to downplay this damaging showing by arguing that "the Commission's broad public interest mandate encompasses, but is not limited by, considerations relevant to antitrust enforcement agencies." MCI Opposition at p. 11. While the Commission is not limited to antitrust considerations alone, this factor likewise cannot be ignored, since Congress has deemed an evaluation of such concerns to be appropriate, consistent with Section 313 of the Communications Act of 1934, as amended; moreover, the only basis for excluding cellular carriers proffered by the Commission is its concern about market power and anti-competitive behavior.

Therefore, an analysis of market power is crucial in order for the Commission's actions to have a rational basis.

MCI further attempts to cloud this issue by indicating that "CTIA's analysis cannot be reconciled with the conclusions of the Department of Justice and the General Accounting Office (GAO) that cellular carriers possess market power." MCI Opposition at p. 11, note 18 [citation omitted]. While cellular carriers may currently possess market power in providing a service where there are only two carriers in each market, neither MCI nor any other party has been able to refute the showing of Radiofone and others that cellular carriers will lose any such power in a marketplace where there will be 10 to 15 competitors (i.e., two cellular providers, up to seven PCS providers, numerous ESMR providers, and mobile satellite service). See Radiofone Petition at pp. 9-10; McCaw Comments at pp. 14-17.

Thus, while MCI and General Communications, Inc. (GCI) argue that cellular providers will be able to dominate PCS, (See e.g., GCI Comments and Opposition at p. 3), this claim has no foundation. Moreover, the parties arguing against cellular participation in PCS ignore Radiofone's observation that PCS will only partially compete with cellular, but in reality will constitute a distinct group of services. Given this fact, a cellular licensee that is not able to participate in PCS, or who obtains a PCS license and fails to exploit it, is likely to find that it is just a matter of

time before its customers migrate to other PCS providers.¹

CTIA correctly observes that cellular carriers should not be unduly restricted in entering the PCS market. See CTIA Opposition/Comments at p. 3-10. CTIA proposes to eliminate any such unfairness by reducing all PCS spectrum blocks to be 10 or 20 MHz. Id. Radiofone wholeheartedly agrees with this concept of a level playing field. However, it is concerned that 10 MHz blocks will be insufficient to support advanced services. As American Personal Communications (APC) notes in its Opposition (at pp. 12-13), "it is a fact that high-speed wireless data services and multi-media applications, such as PostCard, will require 32 kilobytes per second ("Kbps") transmission; advanced network interfaces such as wireless ISDN will require at least 64 Kbps per user. These services simply cannot be wedged into 20 MHz allocations." (emphasis in original);²

¹ In this regard, while Radiofone agrees with CTIA's efforts to create a level playing field for any competition which may occur between cellular and PCS, Radiofone cannot agree to CTIA's proposal that would condition cellular participation in PCS on a divestiture of the carriers' cellular interests. Again, PCS is likely to be a distinct service, with only partially overlapping capabilities compared to cellular. It may very well be that a number of existing cellular customers, especially those who have invested in subscriber equipment, will be quite happy with "plain old cellular service" for a number of years to come. These members of the public should not be forced to migrate to what may very well be a far more advanced, but also more expensive, PCS offering.

² In arguing that advanced services cannot be provided on a 10 MHz block, APC only underscores the fact that a 10 MHz restriction for cellular carriers is unrealistic. In essence, APC and others would doom cellular carriers to

See also Opposition of Bell Atlantic at pp. 5-8. Therefore, Radiofone is more inclined to support the proposal of Bell Atlantic to divide the spectrum into six blocks of 20 MHz each.

Radiofone must object to MCI's argument that "the Commission clearly did not intend that a cellular carrier could bid for a 30 MHz MTA block if it were restricted to bidding for a single 10 MHz BTA by virtue of its coverage overlap, and the Commission should so confirm." MCI Opposition at p. 13. Under MCI's logic, a cellular carrier that serves 10 percent of the population of the Stroudsburg, Pennsylvania BTA (total population 95,709) would be prohibited from applying for the 30 MHz license to serve the New York MTA. Radiofone has already demonstrated in its Petition that the 10 percent population coverage benchmark is not a reasonable one, even for purposes of excluding a carrier from a BTA. See Radiofone Petition at pp. 12-16. However, it is ludicrous to suggest that a carrier serving 10 percent of Stroudsburg, Pennsylvania can exercise undue market power in New York City and in numerous surrounding counties. In order for such carrier to exercise market power in Stroudsburg, it would have to engage in anticompetitive pricing. Because PCS providers will no

providing at best, another form of cellular on its PCS system, rather than innovative services that would complement cellular. The consumer suffers if this approach is upheld.

doubt be designated as commercial mobile service providers pursuant to the Commission's regulatory parity proceeding (General Docket No. 93-252), this carrier would be subject to the requirements of Sections 201 and 202 of the Act. Therefore, it would have to set the same anticompetitive prices throughout the rest of the New York MTA, where it has no alleged market power. The result would no doubt be utter failure of the system, and the carrier would thereby lose millions of dollars in the form of its spectrum bid and construction costs. Important telecommunications policy cannot be based on such absurd assumptions, and MCI's proposed "interpretation" must be rejected.³

Various other commentators suggest a lessening of the 20 percent ownership and/or 10 percent population coverage benchmarks of the current cellular restriction. Certainly any loosening of these barriers would be better than the current rule. In particular, Radiofone supports those commentators who urge that the cellular restriction apply only where the PCS applicant has control over the cellular operation (de jure or de facto). Such approach would be a less onerous alternative. However, in the end, Radiofone

³ An incidental result of MCI's proposal would be to preclude any cellular carrier from attempting to aggregate licenses so as to assemble a nationwide PCS system. Given MCI's announced intention to aggregate a nationwide license, MCI's above interpretation is clearly self-serving. No showing has been made that any cellular carrier exercises market power nationwide, and MCI's efforts would reduce competition to its proposed nationwide network, to the detriment of the public.

must agree with McCaw Communications that "the only rational solution is to eliminate the restrictions in their entirety, since they are fundamentally anticompetitive and disserve the public interest." McCaw Comments at p. 5.

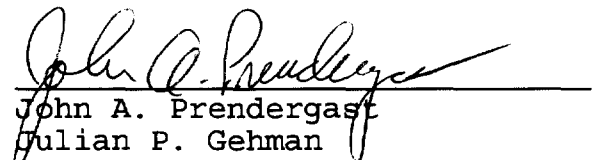
Conclusion

In light of the foregoing, it is respectfully requested that the Commission delete the cellular ownership restriction from its PCS regulations, on reconsideration.

Respectfully submitted,

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